BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERRY VRBAS	)	
Claimant	)	
VS.	)	
	)	Docket No. 158,549
WANKLYN PLUMBING & ELECTRIC	)	
Respondent	)	
AND	)	
	)	
AMERICAN STATES INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

On October 3, 1996, the application of the respondent for review by the Workers Compensation Appeals Board of an Award dated May 3, 1996, entered by Special Administrative Law Judge Douglas F. Martin on claimant's Application for Review and Modification, came on for oral argument.

APPEARANCES

Claimant appeared by and through his attorney, Michael J. Unrein of Topeka, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Melvin J. Sauer, Jr., of Hays, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

(1) The nature and extent of the claimant's injury and/or disability. This includes the issue of whether claimant is permanently and totally disabled under K.S.A. 44-510c.

(2) Whether the Special Administrative Law Judge erred in finding the Court of Appeals issued a "clearly incorrect ruling of law" in Case No. 70,947.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant, a truck driver for respondent, suffered a severe work-related accident when he was thrown from a vehicle driven by his employer, suffering a severance of the spinal cord at T-12. This accident rendered claimant completely and permanently paraplegic from just below the bellybutton. It further required that claimant receive continuous medical treatment for ongoing bladder, rectal and circulatory problems. Claimant was awarded a 92 percent permanent partial general body functional impairment resulting from this injury. This matter was appealed by claimant through the Workers Compensation Director's office, the Marshall County District Court, and to the Court of Appeals in Docket No. 70,941. In an unpublished opinion issued July 1, 1994, the Court of Appeals affirmed the Marshall County District Court's assessment that claimant had suffered a 92 percent permanent partial functional disability to the body as a whole but was not permanently totally disabled. At that time, the Court of Appeals found it significant that claimant was working 35 hours a week as a bookkeeper in an especially accommodating position. They acknowledged that claimant's fellow workers helped him in and out of tight spots and retrieved items for him that he could not reach. The record also indicates that the employer, Montrose Grain, provided additional accommodations in the form of concrete access ramps, modified front doors, modified bathrooms, modified office space, a modified safe, and a modified desk all for the intent and purpose of allowing claimant to continue in his employment with Montrose Grain.

On April 29, 1993, after claimant had been so employed for approximately 2½ years, Montrose Grain was sold and claimant's employment with Montrose Grain was terminated. Since that time claimant has been able to find only limited part-time work two hours per day at $5 per hour with a local senior citizens organization in Mankato, Kansas, although he does volunteer work for up to two hours per day additionally.

Claimant filed for review and modification of his case with a decision being rendered by Special Administrative Law Judge Douglas F. Martin on May 3, 1996. In that opinion Special Administrative Law Judge Martin found claimant to be permanently and totally incapable of any substantial and gainful employment and awarded claimant permanent total disability.

Respondent appeals this matter arguing that claimant is not permanently and totally disabled having proven, in the past, an ability to obtain substantial and gainful employment.

Respondent also argues there has been no change in claimant's preexisting condition to justify review and modification under K.S.A. 44-528.

The Administrative Law Judge, in finding claimant permanently totally disabled, reviewed the opinion of the Court of Appeals in Case No. 70,947 finding that while the Administrative Law Judge has great respect for that decision:

> "but most respectfully disagrees with the conclusion of law concerning interpretation of K.S.A. 44-510c(a)(2). As a general rule, the law of the case would require that K.S.A. 44-510c(a)(2) be interpreted in a manner consistent with the Court of Appeals' previous decision. However, this Administrative Law Judge respectfully submits that in cases where there is a clearly incorrect ruling of law, that the law of the case should not apply to limit justice from being administered in a particular case. Any given law can only have application where it serves justice. This Administrative Law Judge respectfully submits that the Kansas Supreme Court would determine that when the law of the case is incorrect as in this case, that the law, justice, and equity will allow reconsideration of that rule of law."

The Administrative Law Judge went on to find that under K.S.A. 44-510c(a)(2), contrary to the ruling by the Court of Appeals, that claimant has suffered a loss of both legs, thus shifting the burden of proof to the respondent to prove to the contrary that claimant is permanently and totally disabled.

The Court of Appeals in its earlier decision discussed at length whether the terms "loss of" and "loss of use" were synonymous. The Court found that these terms were not synonymous and, while claimant had suffered a loss of use of both legs, he did not necessarily suffer a loss of both legs, thus not qualifying under K.S.A. 44-510c(a)(2) as having been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.

The respondent cites in support of its position the doctrine of stare decisis as being among the most fundamental legal doctrines of the American Justice System. Stare decisis occurs when a deliberate decision of the Court made after arguments on a specific question of law reaches a determination and that determination becomes an authority, or binding precedent in the same Court, or another Court of equal or lower rank in subsequent cases where the very point is again in controversy. {citations omitted.} For the Administrative Law Judge to assume the power of reversing the Court of Appeals on a specific question of law is presumptuous at best. Nowhere in the Kansas Statutory scheme is an Administrative Law Judge granted such power. The finding by the Court of Appeals that claimant's "loss of" versus "loss of use of" are not synonymous would be binding in this matter under the doctrine of stare decisis if this were a published decision. However, as this matter is unpublished, a more appropriate conclusion would be to apply either the doctrine of res judicata or the "law of the case." The Appeals Board therefore finds the Special Administrative Law Judge's decision reversing the Court of Appeals is reversed.

The Appeals Board must next consider as a matter of fact whether claimant has been "rendered completely and permanently incapable of engaging in any type of substantial and gainful employment."

The Court of Appeals in its decision acknowledged that claimant's continuing employment was as a result of an especially accommodating employer. Unfortunately claimant lost this accommodation.

In order to consider claimant's circumstance, the Appeals Board must first consider the method by which claimant's application reached this tribunal. K.S.A. 1987 Supp. 44-528 states in part:

> "(a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the director for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. . . .The director shall hear all competent evidence offered and if the director finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the director may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act."

It is clear by the statutory language and case law that some change is indicated before review and modification applies. Brewington v. Western Union, 163 Kan. 534, 183 P. 2d 872 (1947); Ratzlaff v. Friedeman Service Store, 200 Kan. 430, 436 P. 2d 389 (1968); Brandt v. Kansas Workers Compensation Fund, 19 Kan. App. 2d 1098, 880 P. 2d 796 (1994). In this instance, claimant has undergone more than one change. First, he was admitted to the hospital and underwent a surgical procedure identified as a "DREZ", a procedure intended to sever nerves in claimant's spine in an attempt to control some of the pain he was experiencing. While claimant acknowledged that this operation was somewhat successful in reducing his pain, he also acknowledged that, as a result, his paralysis extended now from the level of his nipples down. Previously the paralysis began at his naval. It is also significant that claimant's work disability has been altered in that he has lost the especially accommodating position with Montrose Grain Company and has, to date, been unable to replace that accommodated position.

A case somewhat similar, although not identical to the case before this Appeals Board, is Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 827 P.2d 299, 1993. In Wardlow, the claimant, a truck driver and dock worker, suffered substantial injury when he fell off of a loading dock and was struck by a forklift across his back and right leg. The accident fractured his lower back, pelvis, right hip and femur and caused a probable fracture to his right ankle.

Claimant had spent his entire life working as a manual laborer. Subsequent to the accident he was rendered incapable of any full-time employment and was limited at best to part-time sedentary work. The Court of Appeals found claimant to be essentially and realistically unemployable and "incapable of engaging in any type of substantial and gainful employment". Wardlow was found to be 50 percent functionally disabled; whereas, the claimant, in this instance, has been found to be 92 percent functionally disabled. In Wardlow the claimant was not provided additional training as is the case here. Nevertheless, in this instance the claimant is only capable of using his additional training if he can find an employer who can be especially accommodating as was the case with Montrose Grain. Unfortunately, subsequent to claimant's loss of job and the additional paralysis suffered as a result of the surgical procedure, claimant is even more limited at this time than he originally was at the time the Court of Appeals issued its memorandum opinion in 1994.

The Court of Appeals found Wardlow not injured in a manner that raised the statutory presumption of permanent total disability under K.S.A. 1992 Supp. 44-510c(a)(2). The Appeals Board likewise finds that, in this instance, the claimant has also not raised the statutory presumption. Nevertheless, the Appeals Board finds sufficient evidence to hold that claimant has proven as a matter of fact that he is currently "completely and permanently incapable of engaging in any type of substantial and gainful employment."

> "[W]hen a workers' compensation statute is subject to more than one interpretation, it must be construed in favor of the worker if such construction is compatible with legislative intent." Houston v. Kansas Highway Patrol, 238 Kan. 192, 708 P.2d 533 (1985). Overruled on other grounds, Murphy v. IBP, Inc., 240 Kan. 141, 727 P.2d 468 (1986); Wardlow, *supra* at 113.

The Court of Appeals found Wardlow to be permanently and totally disabled because he is essentially and realistically unemployable finding that that was compatible with legislative intent. In this instance, the Appeals Board finds that the claimant, Terry Vrbas, is permanently and totally disabled being essentially and realistically unemployable.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of the Special Administrative Law Judge is affirmed for different reasons and an Award is made in favor of claimant, Terry Vrbas, and against the respondent, Wanklyn Plumbing & Electric and its insurance carrier, American States Insurance, for a permanent and total disability. Claimant has previously been awarded $70,266.06. Claimant is currently entitled to receive payments in the amount of $176.91 per week for 309.38 weeks for a total of $54,732.94 making a total award of $125,000. Per the Award of the Special Administrative Law Judge, payments shall commence as of the date of the Award, May 3, 1996.

The fees necessary to defray the expense of administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier as follows:

Nora Lyon & Associates Transcript on Review and Modification	$165.40
Owens, Brake & Associates Deposition of Doug Lindahl	$341.00
Appino & Biggs Deposition of Michael Dreiling	$161.60
Advanced Court Reporting Services Deposition of Russell Hendrich	$152.50
Statutory Special Administrative Law Judge Fee	$150.00

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael J. Unrein, Topeka, KS
Melvin J. Sauer, Jr., Hays, KS
Bryce Benedict, Administrative Law Judge
Douglas F. Martin, Special Administrative Law Judge
Philip S. Harness, Director